

**MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, December 14, 2018

Arizona Courts Building

1501 W. Washington Street, Conf. Room 230

Website: <https://www.azcourts.gov/rules/Advisory-Committee-on-Rules-of-Evidence>

Members Present:

Hon. Sara Agne

Hon. Mark Armstrong (Ret.), Co-Chair

Prof. Jessica Berch

Hon. Maria Elena Cruz

Hon. Jill Davis

Hon. Pamela Gates

Mr. Milt Hathaway (present telephonically)

Hon. Statia Hendrix

Hon. Wallace Hoggatt (present telephonically)

Mr. George Krauja

Hon. Doug Metcalf

Mr. Randall Papetti

Mr. Mikel Steinfeld

Hon. Sam Thumma, Co-Chair

Members Not Present:

Mr. Paul Ahler

Ms. Patricia Refo

Quorum:

Yes

1. Call to Order

Judge Thumma called the meeting to order at 10:00 a.m. and members introduced themselves. Justice Bolick was also in attendance for his presentation on Rule 408.

2. Approval of Minutes from Meeting of September 14, 2018

The minutes were approved by acclamation as circulated.

3. Petition to Amend Rule 807 (R-18-0003)

Judge Armstrong observed that historically, federal rule changes were adopted on December 1 of the year after the rule changes were proposed. Recently, however, the federal courts have added

a year to the process to allow more time for consideration by the Judicial Conference and Supreme Court. Because of this change in process, the date included in the comment to our recently amended Rule 807—December 1, 2018—is incorrect and should be December 1, 2019 (if finally approved by the Supreme Court, as expected). Thus, Judge Armstrong moved that he and Judge Thumma be authorized by the committee to file a new rule petition to correct the date in the comment. The motion was seconded and unanimously approved by the committee. Judge Armstrong stated the petition would be filed by January 10, with a comment period ending May 20, and that a copy of the petition would be distributed to all committee members.

4. Rule 408 in light of *Phillips v. O’Neil*, 243 Ariz. 299 (2017)

In *Phillips v. O’Neil*, 243 Ariz. 299 (2017), the majority held that a consent judgment arising from a civil consumer fraud case was inadmissible under Rule 408 in a subsequent attorney disciplinary proceeding to prove liability. Although the decision was based on Rule 408, the court observed that the language of the consent judgment also precluded its use in most other proceedings.

Justice Bolick, who dissented in *Phillips*, discussed the reasons for his dissent and his focus and preferences about rule-making generally. Principally, he observed that consent judgments and decrees are nowhere mentioned in Rule 408, and that inclusion of judgments and decrees appears contrary to the heading of the rule—“Compromise Offers and Negotiations.” He acknowledged that federal courts have consistently interpreted the rule to apply to consent judgments and decrees, but he does not believe interpretation of Arizona rules should require resort to federal notes and caselaw. He expressed concern about amending rules by judicial decision. He believes this is an access-to-justice and fairness issue. He suggests amending the rule to include consent judgments and decrees if that is indeed the settled law.

Based on Justice Bolick’s presentation, the committee created a Rule 408 Subcommittee to study the issue and make a recommendation to the committee concerning whether a change to the rule would be appropriate. The subcommittee will include Judge Agne, Chair, Judge Metcalf, George Krauja, and Trish Refo.

Judge Metcalf questioned whether there is a recognized definition of consent judgment or decree. Judge Gates observed that the federal note to 1972 proposed rules indicated the rule should encompass “completed compromises when offered against a party thereto.” Judge Armstrong suggested one possibility would be to add that language to the rule together with a comment to the effect that *Phillips v. O’Neil* interpreted “Rule 408 as applying to consent judgments and h[e]ld that the rule precludes the use of a consent judgment’s substantive facts to establish liability for a subsequent claim.” 299 Ariz. at 303 ¶ 18.

Finally, the committee discussed the prospect of proposing a change to Rule 408 to the federal Advisory Committee on Evidence Rules. The subcommittee will consider such action in its deliberations.

5. Report of Workgroup on Uniform Standard for Certain Limited Jurisdiction Cases

The report and materials of the workgroup on this issue were discussed, including that the standard has been adopted in Admin. Order 2018-01, of the Arizona Supreme Court, which established a small claims pilot program in justice of the peace courts. This pilot program has been extended through June 30, 2019 in Admin. Order 2018-104. Judge Thumma pointed out that the standard appears on page 8 of Admin. Order 2018-01 and Appendix A page 7 and Appendix B page 9 of Admin. Order 2018-104.

6. Rules 16 and 45, Arizona Rules of Civil Procedure, and Subpoena Form

Judge Thumma discussed that this has been a long-standing agenda item, with the Committee examining whether to integrate Rule 615 language into the applicable civil rules and accompanying subpoena form. He noted that the Civil Practice and Procedure Committee has also contemplated examining this issue. Judge Thumma stated that the Advisory Committee on the Rules of Evidence had previously decided against suggesting any changes to Rules 611 or 615, or their comments, based on this issue, but that it would continue to remain a standing agenda item for future updates and possible action. Judge Gates observed that changes to the Bench Book have addressed many of the concerns expressed under this agenda item. Judge Armstrong observed that the federal advisory committee is considering a proposal to amend Rule 615, as reflected under item 9, below.

7. Standards for Admissibility of Evidence in Arizona Subject Matter Procedural Rules Given Changes to Family Law Rules in R-17-0054

Judge Thumma discussed his memo of August 31, 2018, with the Committee and included the history of how Committee input and petition efforts had previously assisted in aligning the evidentiary standards applicable in family, probate, and order-of-protection proceedings when the formal rules of evidence are not invoked. Judge Thumma also discussed new Rule 2(b) from the Family Law Task Force's work, which will be effective January 1, 2019. The amended Family Law Rule incorporates Evidence Rule 403 by reference.

Judge Thumma indicated that he has presented a proposal to the Probate Rules Task Force that would conform Probate Rule 3(D) to Evidence Rule 403. This proposal was arrived at in collaboration with Judge Agne and Mikel Steinfeld. That Task Force agreed to incorporate the proposal in its proposed rules, which will be effective January 1, 2020.

Judge Thumma also requested that Committee on Impact of Domestic Violence in the Courts (CIDVC) propose similar conforming changes to Rule 36(a) of the Rules of Protective Order Procedure, which CIDVC has agreed to do. Judge Hendrix, a member of CIDVC, indicated that the timing of such a proposal has not yet been finalized.

8. Report of the Rule 404(b) Subcommittee

Judge Armstrong projected the proposed federal rule change on the screen. Professor Berch presented on behalf of the subcommittee, first explaining the nature of the proposed federal rule change. The primary change would require the government to provide reasonable notice and articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose. The proposal would also require the government to provide such notice in writing prior to trial.

Professor Berch explained that the federal comment period ends February 15, 2019, and that the proposed federal rule changes, if approved, would be effective December 1, 2020. Therefore, any conforming proposal by our committee should be filed by January 10, 2020, seeking an effective date of January 1, 2021. Committee members discussed whether any proposal by our committee should consider the notice and other requirements of Rule 404(c).

9. Other Items for Discussion, including latest Agenda Book of the Federal Advisory Committee on Rules of Evidence

Judge Armstrong projected on the screen the agenda for the October 19, 2018, meeting of the federal Advisory Committee on Evidence Rules, observing that the federal committee is considering changes to Rules 702, 106, and 615, as well as a new Rule 616 based on Maryland Evidence Rule 616.

With respect to Rule 615, “Judge John Woodcock, a former member of the Committee, has asked the Committee to consider possible changes to Rule 615, the rule on excluding witnesses from trial until they testify. The suggested changes are: 1) placing exclusion within the court’s discretion; 2) imposing a timing requirement for a Rule 615 motion; and 3) adding a provision explicitly stating that experts are exempt from a sequestration order. The Reporter’s research on Rule 615 in response to these suggestions uncovered another question for the Committee’s consideration, on which courts are divided: whether the Rule should be amended to provide that a Rule 615 order extends to prohibiting discussions with prospective jurors *outside* the courtroom.”

Judge Armstrong further observed that the Agenda Book includes extensive reports on each agenda item by the committee reporter, Fordham Law Professor Dan Capra. The Agenda Book also includes a comprehensive section on all federal cases interpreting the Confrontation Clause since the *Crawford* case was decided.

10. Next Meeting

The next meeting was tentatively set for April 5, 2019.

11. Call to the Public and Adjournment

Judges Thumma and Armstrong discussed both the review-of-rules and educational functions of the Committee, including the Committee’s recent expansion into programming at the State Bar of Arizona’s CLE by the Sea annual program. Each committee member was asked to prepare and submit three to five hypotheticals and suggested answers for use at future educational events.

Judge Thumma made a call to the public. No members of the public were present. The meeting was adjourned at approximately 11:30 a.m.

